SUN HIP WOH SDN. BHD.

v.

CHEAH SOONG YENG

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 2000 OF 1985]
24 MAY 1990

CONTRACT: *Two main contracts - Privity of contract - Duty of Court in interpreting certain terms - Whether condition binding - Express or implied.*

CIVIL PROCEDURE: *Summary judgment - Dismissal - Leave to adduce further evidence - Principles applicable.*

The plaintiff, P, a sub contractor entered into an agreement with the defendant, D, a contractor for certain work in relation to the improvement of existing drainage and irrigation works in the Krian sub project where the plaintiff was required to raise the height of the bund or artificial embarkment for the irrigation canal to a required level. The defendant had the work contracted out to him by H, the head contractor who had contracted with the Jabatan Parit & Taliair Perak, J, for the work in question.

Extra work was necessary for the bund to reach the required height, however the requisite approval of J was not requested. The extra work resulted in an increase in the amount to be paid by J over and above the original estimate. P had on numerous occasions requested D to submit a fresh bill of quantity to J for the extra work but D had refused to do so. P's application for summary judgment was dismissed and this is an appeal against that decision.

The issues were whether the plaintiff was bound by the main provisions of the contract between J and H including those on bills of quantities and whether the originally priced bill of quantities could be altered or varied prior to or after completion of the work in question and whether further evidence could be adduced after a summary judgment has been granted.

Held:

[1] The Court had the power and the duty to replace certain words in terms of a contract to carry out what was believed by the Court to be the intention of parties thereto. Therefore the originally priced bills of quantities mentioned in the contract between H and J were not intended to be final and conclusive and could be rectified or amended.

[2] The contract between P and D did not contain any reference to the superintending officer and there was no privity of contract at all as regards P and H or P and J.

[3] There was a binding condition, directly or by inference, between H and J and between P and D which enabled the superintending officer of J to allow extra payment for extra work if such work was submitted to the officer for his consideration

and approval. It was sufficient for P to make repeated requests to D instead of having to make such requests to parties with whom he had no contractual relations at all.

[4] In relation to leave to adduce further evidence after a summary judgment has been entered, see *Langdale v. Danby*.

[Application dismissed]

Cases referred to:
Dr. P.H. Chew, Ph. D (London) [1989] MLJ exxi
Langdale v. Danby [1982] 3 All ER 129
Ladd v. Marshall [1954] 3 All ER 754
Robinson v. Bradshaw [1983] 32 WR 95

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 56 r. 2(2)

For the plaintiff - Jamaluddin bin Din; M/s. Thevin Chandran Siva Wong & Jamal
For the defendant - Hira Singh; M/s. Asbir, Hira Singh & Co.

JUDGMENT

Peh Swee Chin J:

The plaintiff (hereafter called the sub-contractor) entered into an agreement with the defendant, (hereafter called the contractor) dated 1 September 1981 for certain work to be done in connection with the "Improvement of Existing Drainage and Irrigation Works in Compartment G in Krian Sub-Project", whereby *inter alia*, the sub-contractor was required to raise the height of the bund or artificial embankment for the irrigation canal to a required level. This, the sub-contractor would have to do by importing red earth of approved quality to lay the same on the top of the existing bund at RM9 per cubic yard as set out in the agreement.

It appeared that contractor had the work in question contracted out to him by the head contractor who had in turn contracted with the Government of Perak for work including the work in question.

It was never disputed that the work undertaken by the sub-contractor was completed to the satisfaction of the Government, neither was it disputed that the sub-contractor had imported so much red earth as to make it possible for it to claim the sum due on the basis of RM9 per cubic yard but for reasons given by the contractor, which apparently found favour with the learned Registrar who dismissed an application under O. 14 from the sub-contractor to enter judgment against the contractor, hence the appeal before me. I allowed the appeal and granted leave to enter judgment as earlier claimed by it.

From the submissions of Counsel the problem appeared to be that there was a failure to request the superintending officer of the Government appointed in regard to the work for his approval of the extra work rendered necessary for the bund to reach the required height before the completion of the said work so that extra payment by the Government for such extra or alternately a failure to bring to the attention of the superintending officer the actual calculations of the actual work done for the purpose of rectifying the originally priced bills of quantities for the Government to make extra payment over and above the stipulated lump sum before the completion of the work in question.

It was the case of contractor that the sub-contractor was bound by the provisions of the main contract between the Government department known as Jabatan Parit & Taliair, Negeri Perak, (hereafter called the Jabatan) and the head contractor including those on the bills of quantities (of materials to be used in the work) as set out therein. The sub-contractor had been given a copy of such main contract to study and only after the study did he decide to enter into the contract between the present contractor and sub-contractor herein. It is interesting to observe that in the beginning though very shortly after the present action was filed, the claim against the head contractor who was sued as a co-defendant on the contract herein, was on ground of lack of privity between the sub-contractor and the head contractor, struck out and the present solicitors for defendant also acted for the earlier co-defendant.

In the bills of quantities, the quantities were set out as a result of a quantity survey conducted by the Jabatan unilaterally, and from the nature of things, a survey of quantity or anything else in respect of any project to be carried out, could not be anything but an estimate.

In reply to the above question that it was so bound, the sub-contractor did not deny the same and seem to agree, saying that accordingly to the form of tender signed by the head contractor, such quantities as assessed by a quantity surveyor of the Jabatan were not conclusive, and that the superintending officer had the power to evaluate and approve any submission or notification of any extra work.

The form of tender referred to by learned Counsel was a printed document of 3 pages with spaces for signature by the head contractor dates, the lump sum and particulars of the contract work, please see Exhibit PS5 to encl. (20). The whole document is set out below:

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This form to be used where quantities form part of the contract

Contract No. KSM. PK. 14 of 1986 for the under-mentioned works entered into on the...day of...19...by the under- signed parties, refers to this form of tender which is and shall be read and construed as part of the said contract.

...

(Contractor)

... ...

(Witness) (Witness)

Date... Date...

...

Government of the State of Perak

Public Works Department

Form of tender

Tender for improvement of the existing drainage and irrigation works in compartment G in Krian sub-project

...

in accordance with drawings Nos. as shown in the Schedule of Plans

...

...

and any other detail drawings supplied in amplification thereof.

Copies of the contract agreement, the above drawings, bills of quantities and/or specification may be sent at the place specified in the tender notice during office hours on any working day until the final date for the submission of tenders.

Pengarah Parit & Tali Air Negeri Perak,
Jalan Dato' Panglima Bukit Gantang,
Peti Surat Pos 1002,
Ipoh, Perak.

Sir,

Under the subject to the conditions of tendering annexed hereto, the undersigned does hereby tender and offer to execute and perform the works and provisions and supply all labour and materials and everything of every kind respectively named, shown, described and alluded to in, or to be inferred from, the form of contract agreement, conditions of contract, bills of quantities and/or specification and drawings, to be executed and supplied to the part of the contractor, for the works above described, in conformity with the said bills of quantities and/or specification and drawings and under and subject to the said conditions of contract for the lump sum named herein below.

2. The undersigned agrees to be bound by and submit to the said conditions of contract and priced bills of quantities, after rectification of any errors therein in the undersigned's prices and calculations, as by the conditions of contract provided, shall form a basis for the valuation of interim certificates and any variation or extra work which may from time to time be ordered by the Superintending Officer.

3. Further, the undersigned agrees to complete the works within 30 Months from the date of possession of site or within such extended time as by the conditions of contract provided.

4. The total amount of this tender in accordance with a summary of the bills of quantities is the lump sum of Ringgit Malaysia Ten Million Eight Hundred & Seventy-Six Thousand & Eight Hundred & Forty Eight...i.e., RM10,876,848.

5. The undersigned desires to be permitted to tender, in due course, for the following work which the undersigned in the ordinary course of business directly carries out and for which provisional sums have been included in the amount of this tender:

   ...

   ...

6. Whereas it is understood that you reserve to yourself the right to accept or to refuse this tender, whether it be lower or higher than any other tender, or of the same amount, the undersigned agrees that this tender shall remain valid and shall not be withdrawn within forty-two (42) days from the final date for submission of tenders.

7. Further, the undersigned agrees, in the event of your acceptance of this tender, to execute the formal contract agreement and to deposit the security deposit and the workmen's compensation and fire insurance policies and produce the receipts paid, for inspection, within ten days from posting, or deliver if by hand, of notification of acceptance.

8. The undersigned confirms, after personal scrutiny, that the documents and drawings used by the undersigned in compiling this tender are true copies of the documents and drawings included in the tender table documents.

Dato Yom Ahmad

Signature of Tenderer ...

9, Medan Tambun, Ipoh.

Address ...

Date ...

Cheah Soong Yeng

Witness to signature of ...

Tenderer

43, Lengkok Mansion, Mansion Park,

Address ...

Ipoh.

...

Date ...

It would be clear from the document signed by the head contractor as set out above, whatever conditions in that form of tender would form part of the contract between the head contractor and the Jabatan, including Clause 2 at p. 3 of the form of tender. It would be obvious that as between the contractor and sub-contractor this condition, being relevant to them would be binding on them as mentioned earlier.

The contention of the sub-contractor was borne by the document set out above, especially by its Clause 2. It is quite clear that the original "priced bills of quantities" mentioned therein were not intended to be conclusive or final. They could be rectified, with alterations thereon becoming inevitable, due to the errors in such priced bills of quantities, to quote "in the undersigned's prices & calculations,".

The preposition "in" in the quoted phrase, was plainly ungrammatical, it was crying out to be replaced with another preposition, i.e. "from". It could be a printing error. To allow the preposition "in" to remain would make the whole clause unintelligible to a great extent. The Court had the power, in fact the duty to replace it with the preposition, i.e. "from", to carry out what was believed by the Court to be the intention of the parties thereto, *ut res magis valeat quam pereat*. Therefore it followed that the originally priced bills of quantities would be rectified by the sub-contractor subject of course to the approval of the superintending officer during

the progress of the work and before the completion of the whole of the work, but if after the completion of the whole work, the jabatan could find it suspicious and equally convenient to stick to their originally priced bills of quantities.

A *fortiori*, if circumstances justified it, the superintending officer could order and approve extra work, or variation of work so that the sum tendered originally by the head contractor could be exceeded, for payment to the head contractor, and the "bills of quantities" so rectified would be a basis for more payment by the Jabatan than the original estimate.

It further appeared that due to the soggy condition of the soil in the area of the irrigation canal, apparently in order to meet the requirements as to the height of the bund, more red earth had to be imported for the purpose, apparently "to complete the work to the satisfaction of the superintending officer" acting for the Jabatan. Consequently the work was thus carried out to the satisfaction of the Jabatan. There was never any suggestion that such quantity of red earth as was actually used was unnecessary for the purpose for which it was used. It just went to show that any survey such as the quantity by the Jabatan, or any other survey such as an opinion survey, was typical in its subsequent failure to tally accurately with the result.

The sub-contractor had further employed an expert to measure the amount of red earth. He described the soil condition, the consolidation or settlement (subsidence) of soil and the method with which he carried out his measurement of the extra red earth used. Full reasons were given. The expert, Mr. Han Chin Yuen had 6 relevant professional qualifications or degrees, one of which was a M.Sc. The Court had no hesitation in accepting the report.

In the contract between the sub-contractor and the contractor, no reference was made to the superintending officer. There was no privity of contract at all as regards the sub-contractor in regard to the Jabatan or to the head contractor both of whom had no contractual relations with the sub-contractor. It was therefore understandable when the sub-contractor said that before the completion of the work, it had on numerous occasions asked the contractor to prepare a fresh bill of quantity to be submitted to the superintending officer in respect of the extra work including the red earth, and that the contractor had neglected and refused wilfully so to do. This allegation had not been denied by the contractor.

The contractor's reply to his failure to claim for extra work from the superintending officer before the completion of the said work appeared to be, (as from affidavits filed by parties herein according to their chronological order) some interpretation on some provision, presumably from the main contract with the Jabatan or with the head contractor, about red earth having to be imported to form bunds to final "consolidated" levels and the contractor further stated in his affidavit, (encl. (25)), that, to quote; "the word, "consolidation" when applied particularly to earthwork, seems to include all waste and subsidence until such dimension and level of the bunds have been formed". The contractor seemed to mean that the Jabatan and the head contractor were already aware of the subsidence of the soil in question. The contractor went on to say that such claim by reason of subsidence had been rejected by the Jabatan as ridiculous as it had been covered by the quoted rate and that

due to absurdity of the claim, he himself did not receive any sum "for the so-called" subsidence. The sub-contractor did not dispute, by any further affidavit, that the claim made by the contractor for the sum allegedly due to the sub-contractor had been rejected by the Government, but it maintained that the contractor had refused and neglected to seek the approval of the superintending officer for the extra work before the said work was completed, it goes without saying that had the contractor wanted to do so, he would have asked his fellow contracting party i.e. the head contractor to refer to the superintending officer then and there.

The root cause appeared to be the unchallenged allegation of the sub-contractor, that before the completion of the work in question, despite its repeated requests to the contractor to prepare the revised bill of quantity for onward transmission to the superintending officer for approval, the contractor had neglected and refused to do so.

I therefore found that there was a binding condition, directly or by inference, between the head contractor and the Jabatan and between the contractor and the sub-contractor, which enabled the superintending officer (and therefore the Jabatan in question) to allow extra payment for extra work during the progress of the said work but before the completion or completion date of the said work, if such extra work was submitted to the superintending officer for the latter's consideration or approval before the completion of the whole work. I was of the view that no such extra work was requested for or submitted before the completion of the work by the contractor, through his employer (i.e. the head contractor) to the superintending officer despite the repeated requests made by the sub-contractor to the contractor. The head contractor could not be blamed in any way. It was entirely reasonable and sufficient for sub-contractor to make repeated requests to the contractor herein, instead of making such requests to parties with whom he had no contractual relations at all.

For all the reasons given hereinbefore, there remained nothing more to decide by resorting to very long and expensive trial. As was said in some previous cases, in an application for summary judgment, if the issues could be decided without requiring a full trial, they should be so decided, even if they were difficult.

I think I ought to deal with the two more applications filed by the contractor after I had ordered judgment to be entered when allowing the appeal by the sub-contractor in connection with the O. 14 application.

There were an application for a stay of execution and another for leave to adduce further evidence at the hearing of further argument in open Court, such further argument having been requested for after I allowed the appeal of the sub-contractor. I disallowed the request for stay, I also dismissed the application for leave to adduce further evidence at the hearing of further argument.

Summary procedure for summary judgment must have been designed for the purpose of keeping short the time for litigations where it would not be necessary to have a long and expensive trial. Further, it is always in the public interest that litigation ought to end soon and no one could be lightly deprived of his fruit of litigation. Further, I did not think that the expression "further argument" permitted any discretion to the Court to allow the adducing of further evidence, given the natural and ordinary meaning of such expression.

If I was wrong in not allowing the application for adducing further evidence at the hearing of further argument in open Court pursuant to O. 56 r. 2(2) of the Rules of the High Court 1980, then I would have exercised my discretion in refusing the application in any event for the following reasons.

In dismissing the application, I must express my appreciation for the assistance I derived from an article entitled "O. 56 r. 2(2): Further evidence for further argument" by Dr. P.H. Chew, Ph. D. (London), (1989) MLJ exxi. The House of Lords in *Langdale v. Danby* [1982] 3 All ER 129, in a land case held to the effect that on an appeal by a defendant against a summary judgment entered against him, leave to adduce fresh evidence should be refused unless the 3 special grounds or conditions as laid down in *Ladd v. Marshall* [1954] 3 All ER 754 have been complied with, *viz.* that the evidence could not have been obtained with reasonable diligence for use at the earlier hearing; the evidence would probably have an important influence on the result though it need not be decisive; and the evidence would be credible. The House of Lords further overruled the practice hitherto that further evidence could be admitted on hearing an appeal against summary judgment without regard to *Ladd v. Marshall supra*, and such practice was considered erroneous from a misinterpretation of *Robinson v. Bradshaw* [1983] 32 WR 95. The decision of the learned Law Lords would apply equally to a hearing of an appeal as against the dismissal of an application for summary judgment as in the instant case.

Here the application for leave to adduce further evidence at the hearing of further argument was in fact and for all practical purposes an application for leave to adduce evidence on the hearing of the appeal from an order made under an application for summary judgment, so that the conditions laid down in *Ladd v. Marshall* fell to be considered.

The further evidence sought consisted of 2 letters, one dated 27 September 1985 written by head contractor to the Jabatan claiming for payment of the sum as claimed in this action for extra work and a subsequent 3-line reply from the Jabatan refusing to pay the same without any reason being given therefore. I felt that the reply, being so very short and without giving any reason, smacked of arrogance and crudeness. The first mentioned letter was already in evidence at the hearing before the learned Registrar, and to call it fresh evidence would be a misnomer. The second letter was alluded to at the hearing before the learned Registrar when the contractor deposed that the application for payment for the extra work was subsequently rejected by the Jabatan and this allegation was never denied by the subcontractor except that it was not done before the completion of the whole work. The second letter was really not strictly fresh evidence. The Court accepted that the 3-line letter could not have been obtained with reasonable diligence for use at the earlier hearing before the learned Registrar, as it was probably not in the possession of the contractor then.

The two letters further showed that they would have probably have an important influence on the result, but rather paradoxically. The result would be against application who sought to adduce such fresh evidence. These 2 letters showed conclusively that the claim was really one made almost 1 year after the said work

was completed to the satisfaction of the Jabatan, and never before the completion of the work in question. If the important influence they had was on the result was adverse to the applicant, it would mean at least, it would not have been any important influence on the result. These 2 of the 3 conditions were not at all met, I had therefore dismissed the application.

Also found at [1990] 2 CLJ 685